

No. 78-675

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In the Supreme Court of the United States

OCTOBER TERM, 1978

ALVIN MICHAEL MAHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 582 F.2d 842.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1978. A petition for rehearing was denied on September 22, 1978 (Pet. App. 15a). The petition for a writ of certiorari was filed on October

20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution under the False Claims Act (18 U.S.C. 287) of a federal contractor who knew his claims for payment were overstated and who knew his presentation of such claims was prohibited, the government must prove that the contractor lacked any legitimate business or other reason for the misrepresentation.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on 11 counts of filing false, fictitious, or fraudulent claims with the United States government, in violation of 18 U.S.C. 287. He was sentenced to concurrent terms of three years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-14a).

The evidence showed that in 1972 General Environments Corporation ("GEC"), which tested equipment and conducted experiments for various commercial and government clients, entered into various "time and materials" contracts with the Mobility Equipment Research and Development Center ("MERDC") of the Department of the Army at Fort Belvoir, Virginia. Under these contracts, GEC agreed to perform experiments for a price not to exceed a certain amount and to bill periodically on the basis of the amount of labor and materials actually employed in

the experiments up to the date of billing. GEC billed MERDC monthly for its work, with the hourly rate varying according to the classification of labor utilized for each experiment; the hourly rate also included GEC's overhead and profit. The monthly billings were prepared by the company bookkeeper based on time sheets that were filled out and signed by the GEC employees who worked on the MERDC contracts (Tr. 32-36, 39-41, 58-60).

In 1972, petitioner was promoted from vice-president to president of GEC. In both of these capacities, petitioner had primary and final responsibility for billing on the MERDC contracts (Tr. 59-60, 92). Accordingly, the bookkeeper submitted all MERDC billings to petitioner for his approval prior to their submission to MERDC. Whenever the bookkeeper did so, petitioner instructed her to change them to reflect more hours than were shown on the employees' time sheets. She made the billing changes that he specified, prepared new time sheets to conform to those billing changes, traced over the employees' signatures on the new time sheets, and destroyed the original ones. Petitioner told her these changes were necessary because the employees did not know to which contract they should charge their hours and that their signatures had to be traced because there was insufficient time to have the employees sign the revised time sheets (Tr. 86-110, 120-125). Three GEC project managers, whose time sheets had been altered, testified that, in fact, they knew on which contracts they were working and that they recorded hours on their time sheets

according to time spent working on those contracts. They said they were never told that they made errors on their time sheets (Tr. 130-137, 138-145, 150-154). Approximately 5,300 fictitious hours, representing \$68,000 in false claims, were billed on the MERDC contracts as a result of petitioner's instructions to the bookkeeper (Tr. 187, 192).

At trial, petitioner admitted instructing the bookkeeper to alter the time sheets but maintained that he was innocent because he acted for a legitimate business purpose and without a motive to defraud the government. Essentially his theory of defense was that while he knew the MERDC contracts were to be paid at an hourly rate for work actually performed, he nevertheless thought they should be billed as "fixed-price" contracts, since the contracts provided for a dollar ceiling. Thus, by his own admission, using the ceiling as his basis, he measured what the government should be charged according to what he, himself, estimated the percentage of completion on a job to be regardless of the amount of labor actually employed (Tr. 257-258, 263, 270-272, 274-275).¹

¹ In other words, if petitioner considered work on a MERDC task to be one-half complete, he would have the bookkeeper bill one half of the maximum price allocated to that task regardless of the amount of labor actually employed. Thus, if he had a task with a ceiling of \$80,000 and found it to be 50% complete, he would charge \$40,000 even if the labor actually employed amounted to only \$5,000 (Tr. 277-280).

ARGUMENT

1. Petitioner does not deny that he knew the claims were false when he submitted them for payment to the government. Nor does he deny that he knew such claims were prohibited. As to these elements of the offense, there is no question that the judge correctly instructed the jury.²

Petitioner contends that the court should also have instructed that the offense requires a finding that petitioner intended to defraud the government. 18 U.S.C. 287, however, contains no express scienter requirement beyond knowledge of the inaccuracy of the claim and consciousness that its submission is prohibited:

Whoever makes or presents to any person or officer * * * of the United States * * * any claim * * *, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Petitioner offers no persuasive reason for disregarding the statutory language and engrafting a further scienter requirement onto the statute. Petitioner's contention that *Morissette v. United States*, 342 U.S. 246 (1952), requires a specific intent to deceive serves only to confirm the decision below. In *Morissette* a deer hunter found and took spent bomb casings on a practice bombing range also used for hunting deer. He was convicted for converting gov-

² See Pet. App. 8a-10a.

ernment property. This Court reversed the conviction because Morissette believed that the property had been abandoned and that it was lawful to take the casings. This Court reasoned that mens rea was a necessary element of all federal crimes that derived from the infamous common law crimes. In sharp contrast, petitioner was convicted precisely because he did know that the claims were inaccurate and he was aware that it was wrong to submit such claims. *Morissette* offers petitioner no further protection than he has already received.

Nor is there any merit in petitioner's argument that due process requires that criminal statutes be strictly construed. Petitioner can hardly claim that he was given inadequate notice that his actions were unlawful, since the jury found that petitioner was conscious that his actions were prohibited. Petitioner may not challenge the statute, which in any event is plain enough on its face, on the ground that someone else might receive inadequate notice. *United States v. Powell*, 423 U.S. 87, 92 (1975); *United States v. Mazurie*, 419 U.S. 544, 550 (1975).

Petitioner's contention that at common law fraud required an intent to cheat is premised on the erroneous assumption that the statute comprehends only common law fraud. As the court of appeals noted, the statute prohibits claims that are either "false, fictitious or fraudulent" (Pet. App. 11a). Even if "fraudulent" claims would be measured by common law criteria, the court correctly held that the statute is violated when the claim is either fictitious or false

(*ibid.*). The purpose of the statute is to assure the integrity and veracity of claims submitted to the government. As the court below held (Pet. App. 12a), that purpose would be substantially frustrated by preventing its application to persons such as petitioner who knowingly submit inaccurate claims with an awareness that it is wrong to do so.

2. Petitioner does not contend that the decision below is in conflict with the decision of any other circuit under 18 U.S.C. 287. Petitioner does, however, contend that the decision below conflicts with several lower court decisions stating that intent to deceive is an element of a violation of 31 U.S.C. 231. Section 231 in part authorizes the government to seek civil recovery and penalties from persons who submit false, fictitious or fraudulent claims to the government. None of the civil cases cited by petitioner, however, absolved any claimant who was aware that its claim was false—with the arguable exception of *United States v. Park Motors*, 107 F. Supp. 168 (E.D. Tenn. 1952).³ In that case, a statute authorized fed-

³ While it is true that dicta in some of the other cases cited by petitioner state that an element of the civil offense is an intent to deceive, their actual holdings are fully consistent with the opinion below. Most of the cited decisions held that the claimant lacked any knowledge at all that the claim was false, fictitious, or fraudulent and therefore there was no liability. *United States v. Ekelman & Associates*, 532 F.2d 545, 548-549 (6th Cir. 1976); *United States v. Mead*, 426 F.2d 118, 122-124 (9th Cir. 1970); *United States v. Priola*, 272 F.2d 589, 593-594 (5th Cir. 1959); *United States v. Lazy F C Ranch*, 324 F. Supp. 698, 700 (D. Idaho 1971); *United States v. Sawn*, 243 F. Supp. 744 (S.D. Iowa 1965); *United States*

eral financial assistance for certain disabled veterans in purchasing automobiles priced less than \$1600. Certain veterans desired automobiles at about \$1700. The government paid approximately \$1600 and the veterans paid the difference. A government employee advised the dealer that the law permitted such separate billings. In the course of obtaining the federal payment, therefore, the dealer in question submitted a certificate to the government stating that the sales price was less than \$1600, when in fact it knew that the total sales price was about \$1700. The verification was not used to obtain something from the gov-

v. Hangar One, Inc., 406 F. Supp. 60, 64, 139-145 (N.D. Ala. 1975). In two other cases claimants had not misstated any facts but had stated exaggerated conclusions based on the facts. In both cases, however, the claimants supplied the underlying factual information, or it was otherwise known to the agency, so the agency could draw its own conclusion; the submission, therefore, was not misleading factually. *United States v. Schmidt*, 204 F. Supp. 540, 542 (E.D. Wis. 1962); *United States v. Goldberg*, 158 F. Supp. 544, 548 (E.D. Pa. 1958). Finally, two of the cases equated an intent to deceive with awareness of and concealment of the discrepancy between the claim and the truth. In *United States v. Aerodex, Inc.*, 469 F.2d 1003 (5th Cir. 1972), for example, a government contract or substituted another type of ball bearing for the type it had agreed to supply. The court dismissed the contention that the contractor in good faith believed the substitutes to be just as good as the specified ones. Since the contractor deliberately mislabelled the bearings to conceal the discrepancy, the court held that the only possible conclusion was that the claimant had intended to deceive the government. Accord: *United States v. National Wholesalers*, 236 F.2d 944, 950 (9th Cir. 1956). In sum, none of these cases absolved any claimant from liability where the claimant knew its claim was inaccurate and knew that it was wrong to submit it.

ernment to which the dealer was not entitled. In sharp contrast, petitioner was conscious that he was asking for more compensation than his company was entitled to receive.

Nor is *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974), in conflict with the decision below. That case considered the scienter requirements for conviction under 26 U.S.C. 7205, which prohibits employees from supplying false or fraudulent tax information to their employers. The court of appeals held that the scienter requirements of Section 7205 are satisfied if the inaccurate information supplied is either supplied with an intent to deceive *or* is of "such a nature that it could reasonably affect withholding to the detriment of the government" (502 F.2d at 655). By analogy, petitioner's misrepresentations were of such a nature that they could reasonably be expected to lead to government payments greater than those required. Petitioner does not contend that he could have escaped liability under this definition of false or fraudulent adopted for purposes of Section 7205.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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